88- 1778

No. .....

Supreme Court, U.S.
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CLERK

In The
Supreme Court of the United States
October Term, 1988

—o—

LOUIS WHATLEY,

Petitioner,

vs.

SKAGGS COMPANIES, INC.,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Whether the District Court erred or abused its discretion by awarding the Petitioner pre-judgment and post-judgment interest at the level which did not adequately compensate him for his losses and which otherwise did not make him "whole"?

2. Whether the District Court erred in concluding that the Petitioner was barred by laches from requesting additional backpay during the period subsequent to the original judgments of the District Court on November 25, 1980 and February 23, 1981?

3. Whether the District Court erred or abused its discretion in denying the Petitioner additional damages pursuant to Rule 54(c) of the Federal Rules of Civil Procedure for the effects of adverse income tax consequences as a result of receiving his backpay award in one lump sum?

LIST OF PARTIES

The list of parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

1. Louis Whatley, Petitioner (plaintiff-appellee-cross appellant in the proceedings below); and
2. Skaggs Companies, Inc., Respondent (defendant-appellant-cross appellee in the proceedings below).

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LOUIS WHATLEY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

The Petitioner, Louis Whatley, asks this Court to review the June 14, 1988 Order and Judgment of the United States Court of Appeals for the Tenth Circuit affirming the Memorandum Opinion and Order of the District Court in Louis Whatley, Plaintiff-Appellee-Cross Appellant v.

Skaggs Companies, Inc., Defendant-Appellant-Cross Appellee.

———o———

OPINIONS BELOW

The Order and Judgment of the Court of Appeals for the Tenth Circuit (June 14, 1988) as well as the Memorandum Opinion and Order of the District Court for the District of Colorado (March 20, 1985) are unreported. A previous opinion of the Court of Appeals is reported at 707 F.2d 1129 (10th Cir. 1983), *cert. denied* at 464 U.S. 938 (1983) which concerned decisions of the District Court reported at 502 F. Supp. 370 (D. Colo. 1980) and 508 F. Supp. 302 (D. Colo. 1981).

———o———

JURISDICTION

The Order and Judgment of the Court of Appeals was issued and entered on June 14, 1988. Petitioner's petition for rehearing was denied on January 30, 1989 as shown in Appendix A, p. App. 7. This Court has jurisdiction to review the Court of Appeals' Order and Judgment by writ of certiorari under 28 U.S.C. § 1254(1).

———o———

STATUTES INVOLVED

The relevant provisions of the Civil Rights Act of 1964, as amended, Title VII, 42 U.S.C. § 2000e-2(e) and

§ 2000e-5 and the Civil Rights Act of 1866, 42 U.S.C. § 1981 are set forth in Appendix C to this petition.

———o———

STATEMENT OF THE CASE

A. Nature of the Case

This is an employment discrimination case brought by the Petitioner against his former employer, Skaggs Companies, Inc. (hereinafter referred to as "Skaggs"). The Petitioner commenced this action on April 23, 1976 in the United States District Court for the District of Colorado, pursuant to 42 U.S.C. § 1981 of the Civil Rights Act of 1866 and 42 U.S.C. § 2000e *et seq.* of the Civil Rights Act of 1964 (Title VII), alleging that Skaggs discriminated against him regarding the terms and conditions of his employment on the basis of his national origin, Mexican-American. Specifically, the Petitioner alleged that he was demoted and constructively discharged by Skaggs from his position as a lobby manager in violation of the above-referenced statutes.

Skaggs denied that it discriminated against the Petitioner and asserted that the actions taken by it against the Petitioner were for legitimate reasons other than his national origin.

B. Course of Proceedings

Subsequent to the filing of Petitioner's Complaint, Skaggs filed an Answer on May 19, 1976 generally denying the allegations in the Complaint and asserting various affirmative defenses.

The matter was tried to the District Court on September 29, 30 and October 1, 1980 after which the matter was taken under advisement. On November 25, 1980 the District Court issued its Memorandum Opinion and Order ordering the Clerk of the District Court to enter judgment in favor of the Petitioner and against Skaggs. The District Court found that the Petitioner was entitled to an award of backpay, attorney's fees, costs and reinstatement to the position from which he was terminated but deferred these remedy matters for a period of twenty days to allow counsel for the parties to confer in an attempt to reach a stipulation with regard to same.

Specifically, the District Court found that the Petitioner established a *prima facie* case of discrimination and that Skaggs' articulated reasons for its personnel actions against Petitioner were not credible and, therefore, it failed to rebut the Petitioner's *prima facie* case. The District Court also found that a constructive discharge did not exist in this case but that Petitioner was terminated from his position and immediately thereafter hired in a lesser capacity after he requested continued employment in some capacity with Skaggs. Unable to support his family on the wages paid to him in the position of lesser capacity, the Petitioner left the employ of Skaggs and took a position with another employer doing strenuous physical labor in order to earn a higher wage. The District Court then deferred ruling on the remedy and granted the parties a period of time to try and reach a stipulation.

Since counsel for the parties were unable to reach a stipulation in regard to the issue of the backpay, the matter was set for hearing before the District Court on

January 29, 1981 after which the matter was taken under advisement. On February 23, 1981 the District Court issued its Supplemental Findings of Fact, Conclusions of Law and Order ordering that judgment be entered in favor of the Petitioner and against Skaggs in the amount of $89,236.15.

The parties stipulated that the Petitioner would have earned wages and bonuses in the amount of $118,169.53 had he remained in his supervisory position with Skaggs. This figure reflected offsets for amounts earned by the Petitioner while in the employ of Skaggs after his termination-demotion and amounts earned by him from other full-time employment after he left the employ of Skaggs.

Specifically, as to the unresolved matters, the District Court found it unlikely that the Petitioner would have been able to earn wages from his part-time employment after his termination-demotion had he not lost his supervisory position with Skaggs and, therefore, subtracted these sums from his backpay award. Additionally, the District Court found that the Petitioner was not entitled to sums representing profit sharing benefits since he left the employ of Skaggs for reasons unrelated to any act of discrimination thereby forfeiting any rights to these benefits. No finding was made as to the issue of interest on the backpay award.

Both parties to this litigation filed Notices of Appeal, the Petitioner appealing the remedy issues and Skaggs appealing the issues of liability as well as remedy. On May 9, 1983 the Court of Appeals, after considering the issues raised in the appeals of both parties, issued its opinion wherein it affirmed the judgment of the District Court and remanded to it the matters of prejudgment interest on

the Petitioner's backpay award and the appropriate award of attorney's fees for Petitioner's counsel for work performed on the appeal. Skaggs petitioned this Court for a writ of certiorari, which petition was denied on October 31, 1983. The mandate issued and the matter was remanded to the District Court for determination of the remaining issues in accordance with the Court of Appeals' decision.

On May 22, 1984 the Petitioner filed a Notice of Information in the District Court advising the Court that the parties had reached a stipulation regarding the issue of attorney's fees for Petitioner's counsel's work on appeal. Petitioner further advised the District Court of the impasse between the Petitioner and Skaggs regarding the issue of interest on the Petitioner's backpay award and the appropriate level thereof. Additionally, the Petitioner filed two post-appeal motions in the District Court requesting the Court to rule upon the legitimacy of Skaggs' offer of reinstatement to the Petitioner in late 1980 as well as the Petitioner's request for further relief pursuant to Rule 54(c) of the Federal Rules of Civil Procedure on the issue of the adverse income tax consequences sustained by the Petitioner on his backpay award. On March 1, 1985 the District Court ordered that the Petitioner receive prejudgment interest on his backpay award at the statutory rate of the State of Colorado which was eight percent and denied the Petitioner's motions regarding Skaggs' reinstatement offer and the Petitioner's motion for additional relief regarding adverse income tax consequences. On March 20, 1985 the District Court issued its written Memorandum Opinion and Order in conformity with its bench ruling on March 1, 1985. On May 7, 1985 the

District Court issued another Order awarding the Petitioner additional post-judgment interest and on May 9, 1985 an Amended Judgment was prepared by the Deputy Clerk of the District Court which amended judgment was approved by the District Court. Timely notices of appeal were filed by both parties.

C. Statement of Facts

The Petitioner will not restate the facts which were the underlying basis for his Complaint in the District Court and previous appeals but will confine his factual representations to those which are relevant to the subject matter of this petition.

The relevant backpay period for which the petitioner was compensated spanned a period in excess of nine years for September 17, 1971 through December 4, 1980. Subsequent to the District Court's initial decision concerning liability issued on November 25, 1980 counsel for Skaggs contacted Petitioner's counsel and extended an offer of reinstatement to lobby manager positions in Memphis, Tennessee and St. Louis, Missouri. The petitioner, through his counsel, declined these positions due to the fact that he resided in the State of Arizona for health reasons and could not tolerate humid climates like Memphis and St. Louis because of his physical condition. On January 29, 1981 a stay of the order pending the appeal was granted to Skaggs by the District Court. On February 21, 1981 counsel for Skaggs confirmed the discussions between counsel regarding the reinstatement issue which had taken place in December of 1980. The Court of Appeals decided the appeal in favor of the Petitioner and remanded the matter to the District Court for determin-

ation of the interest question. Skaggs petitioned this Court for a writ of certiorari which was denied on October 31, 1983. Before the District Court determined the issues remanded to it by the Court of Appeals, on February 6, 1984, Skaggs issued two checks payable to the Petitioner. The first check was for the Petitioner's backpay as previously ordered by the District Court on February 23, 1981 spanning the period September 17, 1971 to December 4, 1980. The second check was for post-judgment interest from the date of the District Court's determination of the backpay on February 23, 1981 to February 6, 1984 calculated based upon the state statutory rate. The amount of backpay awarded to the Petitioner was $89,236.15. From this amount Skaggs withheld $32,911.99 in federal withholding, $5,978.82 in social security withholding and $3,568.80 in state withholding taxes resulting in a net backpay award to the Petitioner in the amount of $46,776.54. The Petitioner was taxed at the aforementioned level due to the fact that Skaggs paid the backpay award in one lump sum payment as if it was earned in one year. The Petitioner subsequently filed motions with the District Court requesting a determination of the validity of the reinstatement offer made by Skaggs in December of 1980 and a request for further relief pursuant to Rule 54(c) of the Federal Rules of Civil Procedure to compensate the Petitioner for the adverse tax consequences which resulted in his receiving his backpay award in one lump sum. As previously indicated the District Court issued its Memorandum Opinion and Order on March 20, 1985 ordering pre and post-judgment interest payable to the Petitioner at the rate of eight percent per annum and further denying the Petitioner's motions regarding the rein-

statement issue and the request for additional relief. Subsequent motions were filed and the judgment was amended on May 9, 1985. Both parties filed timely notices of appeal. On June 14, 1988 the Court of Appeals affirmed the District Court's interest award calculated on the state statutory rate of eight percent and affirmed the remainder of the judgment of the District Court on the issues of the reinstatement "offer" and the request for additional relief because of the adverse tax consequence without any comment, discussion or reference whatsoever. Petitioner's counsel, believing that the Court inadvertently overlooked the two issues since there was no discussion or comment filed a petition for rehearing pointing out that fact to the Court. The petition for rehearing was subsequently denied on January 30, 1989, again with no comment or discussion. See Appendix A, p. App. 7.

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REASONS FOR GRANTING THE WRIT

The Petitioner, in his cross appeal to the Court of Appeals, raised substantial issues regarding the spirit of Title VII of making victims of discrimination "whole" if discrimination is proven such as it was here. The Court addressed only the issue of the interest rate level awarded to the Petitioner during the backpay period and after judgment totally avoiding without comment the other two issues raised by the Petitioner. In his petition for rehearing Petitioner pointed out the fact that two substantial issues had not been addressed. The petition for rehearing was denied and, once again, there was no com-

ment, discussion or reference by the Court. A litigant would expect, at a minimum, that the Court would have stated that Petitioner's argument was without merit or something. The action of the Court of Appeals in its treatment of the substantial issues raised in Petitioner's cross appeal clearly departs from the accepted and usual course of judicial proceedings.

On the issue that the Court of Appeals did address, namely, the appropriate rate of interest, the Court affirmed the District Court's adoption of the state statutory rate. There is a lack of uniformity among the circuit courts on this question. See *E.E.O.C. v. Pacific Press Publishing Ass'n.*, 676 F.2d 1272 (9th Cir. 1982) and *Chisholm v. U.S. Postal Service,* 665 F.2d 482 (4th Cir. 1981) where both Courts affirm interest awards calculated on the adjusted prime rate as used by the Internal Revenue Service as compared to the instant case and *Gelof v. Papineau,* 829 F.2d 452 (3rd Cir. 1987) where the Court affirmed an award based simply on state statutory interest rates. The former cases reflect the carrying out of the federal court's duty to make the victims of discrimination "whole" while the latter case does not.

The two remaining issues are those which the Court of Appeals did not address. First, the District Court held that the Petitioner was barred by laches of asserting any additional claim of lost wages. After the District Court's decision on liability on November 25, 1980 in which it ruled that he was entitled to an equivalent position, but before the decision of the Court on the issues of backpay and attorney's fees on February 23, 1981, Skaggs, on January 29, 1981, obtained a stay of the District Court's first de-

cision pending its appeal. To bar the Petitioner from any relief after the date of the District Court's first decision on a theory of laches is contrary to the proper application of that doctrine and contrary to the make "whole" spirit of Title VII as both are set forth in *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975). Second, the Court of Appeals in *Blim v. Western Electric Co., Inc.*, 731 F.2d 1473 (10th Cir. 1984), *cert. denied* at 469 U.S. 874 (1984), reversed a District Court's award of additional damages to compensate the plaintiff for additional taxes resulting from receipt of the backpay award in one lump sum holding that the income averaging provisions of the Internal Revenue Code allowing averaging over a five year period would eliminate nearly all of any increased tax. Thereafter in *Sears v. Atchison, Topeka & Santa Fe Ry.*, 749 F.2d 1451 (10th Cir. 1984), *cert. denied* at 471 U.S. 1099 (1985) the Court distinguished *Blim* and affirmed a District Court award of an adverse tax component because the plaintiffs would be receiving seventeen years of backpay and could income average for a period of only three years. The *Sears* plaintiffs did not demand a tax component in their initial pleadings or remedial submissions but made such a request pursuant to Rule 54(c) of the Federal Rules of Civil Procedure. The Petitioner here received a backpay award spanning a period in excess of nine years making him ineligible to income average over the entire back pay period. Further, he sought relief under Rule 54(c) promptly upon learning how Skaggs intended to treat and/or tax his back pay award. Denying the Petitioner relief under Rule 54(c) is not in keeping with the make "whole" spirit of Title VII. The Court of Appeals apparent "affirmance" of the District Court's

action is inconsistent with its holding in *Sears* and, furthermore, flies in the face of this Court's decision in *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975).

Finally, the adverse tax consequence issue is an important question of federal law which should be settled by this Court especially since income averaging is no longer available to victims of discrimination as a result of the repeal of the income averaging provisions of Internal Revenue Code under the Tax Reform Act of 1986.

ARGUMENT

I.

THE DISTRICT COURT ERRED OR ABUSED ITS DISCRETION BY AWARDING PETITIONER PRE-JUDGMENT AND POST-JUDGMENT INTEREST ON HIS BACKPAY AWARD AT SUCH A LEVEL WHICH DID NOT COMPENSATE HIM FOR HIS LOSSES OR OTHERWISE MAKE HIM "WHOLE" WITHIN THE SPIRIT AND INTENT OF 42 U.S.C. § 2000e ET SEQ.

A. Pre-Judgment Interest

The Petitioner urged the District Court to adopt the interest rate utilized in *Richardson v. Restaurant Marketing Associates, Inc.,* 527 F. Supp. 690 (N.D.Cal. 1981) which was ninety percent of the average prime rate as determined by the Federal Reserve Bank for the year in which the calendar quarter occurs and that the interest be compounded quarterly. Skaggs urged the Court to adopt the state rate of interest as set forth in 1973 C.R.S. § 5-12-101 (1984 Cum. Supp.). The District Court cited in its

Memorandum Opinion and Order dated March 20, 1985 the case of *International Association of Machinists and Aerospace Workers v. United Aircraft Corp., AFL-CIO,* 534 F.2d 422 (2d Cir. 1975) in which the Court stated "the decision whether to award prejudgment interest is governed by federal law, although it may be proper, as a matter of convenience, to look to state law in order to determine the appropriate rate." The District Court then looked to the legal rate of interest in the State of Colorado which was eight percent per annum compounded annually. The District Court then stated simply "I find that this rate, under the circumstances in this case, equitably compensates the plaintiff for loss of the benefit of his wages pending judgment."

As indicated above the backpay period in the instant case spans the period from 1971 to 1980, years in which double-digit inflation was the rule rather than the exception. In *Richardson v. Restaurant Marketing Associates, Inc., supra,* the Court recognized "the continued increases in the rate of inflation and rapid fluctuation of the prime rate in recent years" in its analysis of the appropriate level of pre-judgment interest to be awarded. In that case the Court considered interest rates used by the Internal Revenue Service but rejected this approach because these figures did not fully and accurately reflect current economic changes. The Court then adopted a rate which amounted to ninety percent of the average prime rate for the year in which the calendar quarter occurred. The average prime rate figures utilized in *Richardson* were those obtained from the Federal Reserve Bank.

The District Court here found that Skaggs retained possession of money rightfully due to the Petitioner during

the nine year period and had the benefit of either spending it or earning interest on it. Skaggs derived the benefit of retaining possession of the Petitioner's money during periods of high interest rates while, on the other hand, the Petitioner was deprived of the money and awarded prejudgment interest at the rate of eight percent during periods of double-digit inflation. An award of prejudgment interest at the rate of eight percent per annum can hardly be said to have made the Petitioner "whole" under the spirit and intent of Title VII as set forth in *Albemarle Paper Co. v. Moody, supra.* An award of eight percent per annum may be equitable in certain economic periods when inflation has been of the single-digit variety. Such was not the case here and the Petitioner was not made "whole". The current trend of the federal courts demonstrates a growing awareness that inflation is a factor to consider and that an award of simple interest on backpay awards at the legal rate may not be sufficient. See *Association Against Discrimination in Employment, Inc. v. City of Bridgeport,* 572 F. Supp. 494 (D.C.Conn. 1983) where § 6621 of the Internal Revenue Service Code was utilized; *E.E.O.C. v. Pacific Press Publishing Ass'n.*, 482 F. Supp. 1291 (N.D.Cal. 1979), *aff'd* at 676 F.2d 1272 (9th Cir. 1982) where the Court allowed prejudgment interest at the adjusted prime rate set by § 6621(3) of the I.R.S. Code; *Aracne v. Lucky Stores, Inc.*, 31 E.P.D. ¶33,565 (N.D.Cal. 1983) where the Court allowed the prejudgment interest award at the adjusted prime rate to be compounded during the backpay period; *E.E.O.C. v. St. Joseph's Paper Co.*, 557 F. Supp. 435 (W.D.Tenn. 1983) where the Court adopted the rate used in *Pacific Press Publishing; Tilly v. Harris-Teeter Supermarket*, 545 F. Supp. 686

(W.D.N.C. 1982) where the Court ordered the adjusted prime rate compounded monthly; *E.E.O.C. v. Wooster Brush Co.*, 523 F. Supp. 1256 (N.D.Ohio E.D. 1982) where the Court adopted the adjusted prime rate and *Fadhl v. San Francisco Police Dep't.*, 553 F. Supp. 38 (N.D.Cal. 1982) where the Court adopted ninety percent of the average prime rate compounded quarterly. It is clear from this trend that the federal courts have not necessarily taken the "convenient" approach but have addressed the issue in such a manner as to fulfill the make "whole" purpose of Title VII.

B. Post-Judgment Interest

The Petitioner incorporates and adopts the arguments set forth in paragraph I.A. set forth above. The District Court held that the make "whole" policy of Title VII does not trump 28 U.S.C. § 1961 which provides that interest on any money judgment in civil cases recovered in a District Court shall be calculated from the date of the entry of the judgment at the rate allowed by state law. The provisions of 28 U.S.C. § 1961 do not preempt the make "whole" purposes of Title VII. In *Chisholm v. U.S. Postal Service*, 24 E.P.D. ¶31,326 (D.C.N.C. 1980) the District Court ordered that defendants pay post-judgment interest on all backpay and frontpay awards made to be computed from the date of the judgment and paid at the rate of the adjusted prime rate as used by the Internal Revenue Service and adopted by the National Labor Relations Board and further that such interest was to be computed and compounded on a monthly basis. This decision was affirmed at 665 F.2d 482 (4th Cir. 1981). In *Chisholm* the trial

court as well as the appellate court truly effectuated the purposes of Title VII.

II.

THE DISTRICT COURT ERRED OR ABUSED ITS DISCRETION BY CONCLUDING THAT THE PETITIONER WAS BARRED BY LACHES FROM ANY ADDITIONAL BACKPAY SUBSEQUENT TO THE COURT'S ORIGINAL JUDGMENTS ON NOVEMBER 25, 1980 AND FEBRUARY 23, 1981.

On November 25, 1980, after finding that Skaggs had violated the Petitioner's rights to equal employment opportunity, the District Court ordered Skaggs to reinstate him "to an equivalent position with Skaggs". Additionally, the District Court held that the Petitioner suffered from a partial disability and presently resides in Mesa, Arizona, in part, for health reasons. Prior to the District Court's consideration of the remedy questions, counsel for Skaggs advised Petitioner's counsel in December of 1980 that Skaggs had canvassed all of its offices to ascertain where vacancies existed for the position of lobby manager and further indicated that two positions were available in Memphis, Tennessee and St. Louis, Missouri. After consultation with the Petitioner, Petitioner's counsel communicated to counsel for Skaggs that Petitioner was not interested in the positions at these two locations. Counsel for Skaggs later confirmed these discussions by letter dated February 25, 1981. However, on January 29, 1981 a stay had already been granted to Skaggs pending its appeal of the Court's initial decision regarding liability wherein reinstatement of Petitioner was ordered. The Petitioner submits that the "offer of reinstatement" made by Skaggs was not in conformity with the order of the District Court

in that it was not an offer of reinstatement to an "equivalent position". The Petitioner submits that the offer of reinstatement was not legitimate and was merely an attempt on the part of Skaggs to avoid having to reinstate the Petitioner and to circumvent its potential liability for continued backpay. The District Court concluded that the Petitioner was barred by laches because he did not petition the Court for relief until after Skaggs' appeal was decided some three years after the Court's initial decision. It is clear that the District Court's original order placed the onus of the reinstatement matter upon Skaggs and not the Petitioner. The District Court for whatever reason placed the onus upon the Petitioner instead of Skaggs where it belonged. Skaggs was allowed to have its cake and eat it too. It obtained the stay, relieving it of the Court's order to reinstate Petitioner to an equivalent position, and then it was relieved of any obligation or additional damages for the period which elapsed during the pendency of the appeal after the appeal was decided against it. Once again, the Petitioner is not made "whole" contrary to this Court's decision in *Albermarle Paper Co. v. Moody*, *supra*.

III.

THE DISTRICT COURT ERRED OR ABUSED ITS DISCRETION BY DENYING PETITIONER'S REQUEST FOR ADDITIONAL RELIEF PURSUANT TO RULE 54(c) TO COMPENSATE HIM FOR THE ADVERSE INCOME TAX CONSEQUENCES RESULTING FROM THE PETITIONER'S RECEIVING HIS BACKPAY AWARD IN ONE LUMP SUM.

On February 6, 1984 Skaggs issued two checks to Petitioner for the backpay award and post-judgment interest

upon the award from the date of the District Court's judgment. The first check was for $46,776.54 which represented the backpay award of $89,236.15 after tax and other withholding deductions. The total withholding against the Petitioner's backpay award was $42,459.61. The enormous amount of tax (47.58%) was the result of the Petitioner receiving the entire backpay award in one taxable year. Due to the fact the Petitioner's earnings during the backpay period were minimal as a result a disabling injury which he sustained, it is very likely that the Petitioner probably would have paid no tax or a minimal tax had he received the monies which constitute his backpay award during the taxable years when they were due to him but for the discrimination of Skaggs. On May 22, 1984 the Petitioner filed a motion with the District Court requesting additional relief pursuant to Rule 54(c) of the Federal Rules of Civil Procedure. Rule 54(c) allows for the granting of relief to which a party, in whose favor a judgment is rendered, is entitled even if the party has not demanded the requested relief in his pleadings. In *Sears v. Atchison, Topeka and Santa Fe Railway Company*, 749 F.2d 1451 (10th Cir. 1984) the Court of Appeals affirmed the lower court's award of additional relief under Rule 54(c) in favor of the plaintiffs when they suffered adverse income tax consequences of receiving their backpay awards in one taxable year. It should be pointed out that in the *Sears* case the issue of the adverse tax consequence was raised subsequent to a remand from the Court of Appeals which is precisely the situation that exists here. The Court of Appeals, in affirming the lower court's award of additional relief, stated that such an award is appropriate in cases where the litigation is protracted. Again, this is the

exact same situation as exists here. The Petitioner was eligible to income average in order to minimize his tax. However, pursuant to the Tax Reform Act of 1984, he could only average the three years preceding the computation year. There can be no question that the Petitioner has been taxed in such a manner that he would not have otherwise suffered but for the discrimination of Skaggs against him. Penalizing the Petitioner in such a manner flies in the face of the make "whole" purposes of Title VII.

———o———

CONCLUSION

For the reasons stated above, Petitioner requests that its petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LOUIS WHATLEY,	)	
	)	
Plaintiff-Appellee-Cross-Appellant,	)	Nos. 85-1784 and 85-1846
v.	)	
	)	(D.C. No. 76-C-449
SKAGGS COMPANIES, INC.,	)	(D. Colo.)
	)	
Defendant-Appellant-Cross-Appellee.	)	

ORDER AND JUDGMENT

Before HOLLOWAY, Chief Judge, TACHA, Circuit Judge, and BRATTON.*

This appeal and cross-appeal is from the district Court's award of interest on a judgment that was affirmed by this court in a previous appeal. *Whatley v. Skaggs Companies, Inc.*, 707 F.2d 1129 (10th Cir. 1983). In that appeal we remanded to the district court saying:

> We agree that in a proper case interest is an allowable part of a back pay award. Further, the purpose of Title VII is indeed to make whole the victims of unlawful employment discrimination. Title VII,

* The Honorable Howard C. Bratton, United States District Judge, District of New Mexico, sitting by designation.

however, does not specifically provide for interest on a back pay award; interest is within the discretion of the trial court. *Id.* at 1140. (Citations and footnotes omitted.)

On remand the district court awarded both prejudgment and postjudgment interest at the Colorado statutory rate of 8%. Both parties appeal the interest award.

After a full review of the record and the district court's opinion, we are convinced that the district court did not abuse its discretion and awarded interest based upon proper legal grounds and equitable considerations.

AFFIRMED.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case Nos. 85-1784 and 85-1846

LOUIS WHATLEY,

Plaintiff-Appellee-Cross-Appellant,

vs.

SKAGGS COMPANIES, INC.,

Defendant-Appellant-Cross-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MEMORANDUM OPINION AND ORDER DATED MARCH 20, 1985 AND AMENDED JUDGMENT DATED MAY 9, 1985

PETITION FOR REHEARING ON BEHALF OF LOUIS WHATLEY

COMES NOW Louis Whatley, by and through his attorney, Paul A. Baca, and pursuant to Rule 40 of the Federal Rules of Appellant Procedure and hereby petitions this Court for a rehearing regarding the Order and Judgment of this Court of June 14, 1988 and as grounds therefore states as follows:

STATEMENT OF THE CASE

(1) Skaggs Companies, Inc., appealed the Memorandum Opinion and Order of the United States District Court dated March 20, 1985 and the Amended Judgment dated May 9, 1985 and in its appeal raised the following questions:

a. Whether the District Court erred in awarding any prejudgment interest to Whatley?

b. Whether the District Court erred in awarding prejudgment interest to Whatley for the full backpay period from 1971 to 1981?

c. Whether the District Court abused its discretion in applying the interest percentage of 8% per annum in accordance with Colorado Law?

(2) That Louis Whatley cross-appealed the Memorandum Opinion and Order of the United States District Court for the District of Colorado dated March 20, 1985 and Amended Judgment dated May 9, 1985 and in his cross-appeal raised the following issues:

a. Whether the District Court erred or abused its discretion by awarding the cross-appellant prejudgment and postjudgment interest on his backpay at the rate of 8% per annum which did not adequately compensate the plaintiff or otherwise make him "whole"?

b. Whether the District Court erred in concluding that the cross-appellant was barred by laches from requesting additional backpay during the period subsequent to the original judgment of the District Court on November 25, 1980 and February 23, 1981?

c. Whether the District Court erred or abused its discretion in denying the cross-appellant additional damages pursuant to Rule 54(c) of the Federal Rules of Civil Procedure for the effects of adverse income tax consequences as a result of the cross-appellant receiving his backpay award in one lump sum as if earned in one year?

(3) The parties to the appeal and the cross-appeal briefed and presented their respective arguments to this Court on the issues raised in the appeal and the cross-appeal referred to in paragraphs 1 and 2 above. After oral argument by respective counsel for the parties the appeal and cross-appeal were taken under advisement by this Court.

(4) On June 14, 1988 this Court issued its Order and Judgment regarding Case Nos. 85-1784 and 85-1846 af-

firming the decision of the District Court holding that it did not abuse its decretion when it awarded prejudgment and post judgment interest on the backpay award at the Colorado statutory rate of 8%. (See attached Exhibit A)

(5) That this Court overlooked addressing or deciding the issues raised by Whatley in his cross-appeal. In paragraphs 2(b) and 2(c) set forth above.

ARGUMENT

As indicated above, this Court has overlooked deciding or addressing two substantial issues raised in Whatley's cross-appeal. The first issue concerns the legitimacy of a so called offer of "reinstatement" which, if this Court agrees with the position taken on this issue by Whatley, could involve several years of additional backpay. The second issue involves the question of whether or not the District Court erred or otherwise abused its discretion in refusing to grant Whatley additional relief under Rule 54 (c) of the Federal Rules of Civil Procedure. Whatley requested this relief in the face of suffering an enormous amount of tax (47.58%) amounting to $42,459.61 as a result of Skaggs' withholding of taxes from him as if he earned his entire backpay within one year.

These two issues clearly involve matters which make the victim of the discrimination "whole" in accordance with the spirit of Title VII as set forth in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). In order to accomplish the mandate of the Supreme Court to make victims of discrimination "whole", this Court must address and decide the remaining two issues in Whatley's cross-appeal.

WHEREFORE Whatley petitions this Court for rehearing on the issues overlooked by this Court in his cross-appeal for the reasons set forth above.

Respectfully submitted,

/s/ Paul A. Baca
Paul A. Baca
1900 Grant Street, Suite 610
Denver, Colorado 80203
(303) 861-9200

ATTORNEY FOR LOUIS WHATLEY

CERTIFICATE OF MAILING

I hereby certify that I have served a true and correct copy of the foregoing PETITION FOR REHEARING on behalf of Louis Whatley upon opposing counsel by depositing a copy of same in the United States Mails, postage prepaid, this 27th day of June, 1988 addressed as follows:

Victor Boog
Earl K. Madsen
Bradley, Campbell and Carney
1700 Washington Avenue
Golden, Colorado 80401

/s/ Paul A. Baca

JANUARY 30, 1989

Before Honorable William J. Holloway, Jr., Honorable Deanell R. Tacha, Circuit Judges, and Honorable Howard C. Bratton, District Judge

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* of the United States District Court for the District of New Mexico, sitting by designation.

LOUIS WHATLEY,	)	
	)	
Plaintiff-Appellee, Cross-Appellant,	)	
	)	Nos. 85-1784
v.	)	and 85-1846
	)	
SKAGGS COMPANIES, INC.,	)	
	)	
Defendant-Appellant, Cross-Appellee.	)	

This matter comes on for consideration of plaintiff's petition for rehearing filed in the captioned case.

Upon consideration whereof, plaintiff's petition for rehearing is denied.

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 76-C-449

LOUIS WHATLEY,

Plaintiff,

v.

SKAGGS COMPANIES, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff Whately prevailed against the defendant Skaggs Companies, Inc. on claims of employment discrimination under Title VII, 42 U.S.C. §§ 2000e *et. seq.*, and the Civil Rights Act of 1870, 42 U.S.C. § 1981. *Whatley v. Skaggs Companies, Inc.*, 502 F. Supp. 370 (D. Colo. 1980). Job reinstatement and back pay were ordered, and back pay damages were subsequently determined. *Whatley v. Skaggs Companies, Inc.*, 508 F. Supp. 302 (D. Colo. 1981). Skaggs appealed on a number of issues and Whately cross-appealed. The Court of Appeals affirmed the judgment except that it remanded the case to this court for a determination whether prejudgment interest should be awarded on the plaintiff's back pay award, and, if so, how much. *Whatley v. Skaggs Companies, Inc.*, 707 F.2d 1129 (10th Cir. 1983).

Whatley has filed three post-appeal motions. The issue on remand and the motions have been thoroughly briefed. Oral argument has been held.

I. *Prejudgment Interest.*

On appeal, Whatley asserted that I erred by failing to award prejudgment interest on the back pay award. In its opinion, the Tenth Circuit stated:

> "We agree that in a proper case interest is an allowable part of a back pay award. *See United States v. Lee Way Motor Freight, Inc.*, 625 F. 2d 918, 940 (10th Cir. 1979). Further, the purpose of Title VII is indeed to make whole the victims of unlawful employment discrimination. Title VII however, does not specifically provide for interest on a back pay award; interest is within the discretion of the trial court[12] . . . . On remand the trial court may consider the circumstances and should make findings and a determination on the propriety of awarding interest and the proper award, if the court finds that interest should be awarded.
>
> * * *
>
> 12. See *Goodwin v. City of Pittsburgh*, 480 F. Supp. 627, 635 n.3 (W.D.Pa.), *aff'd without opinion*, 624 F.2d 1090 (3d Cir. 1980)."

707 F.2d at 1140.

The Second Circuit addressed the propriety of awarding prejudgment interest on a back pay award under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, in *Lodges 743 and 1746, International Association of Machinists and Aerospace Workers v. United Aircraft Corp., AFL-CIO*, 534 F.2d 422, 455, 47 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976). After discussing the Act's remedial policies, the court explained:

> "In suits for breaches of labor agreements, as in other areas, a vital ingredient in the determination whether

> to award prejudgment interest is a desire to make whole the party injured by the breach, but in appropriate circumstances, compensatory principles 'must be tempered by an assessment of the equities.' *Norte & Co. v. Huffines*, [416 F.2d 1189, 1191, (2d Cir. 1969), *cert denied sub nom. Muscat v. Norte & Co.*, 397 U.S. 989 (1970)]; *see Board of Commissioners v. United States*, 308 U.S. 343, 352, 60 S.Ct. 285, 289, 34 L.Ed. 313 (1943). ('[Interest] is denied where its exaction would be inequitable.') Although we are of course unable to anticipate the myriad factual situations which might arise, such factors as inordinate delay in prosecution of a suit or wrong-doing by the plaintiff could well give a district court pause before awarding prejudgment interest."

534 F.2d at 447.

The back pay provision of Title VII was expressly modeled on the back pay provision of the National Labor Relations Act. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975). It is the purpose of Title VII "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.* at 418. In *Albemarle Paper*, the Court directed that "[t]he injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." *Id.* at 418-19, *citing Wicker v. Hoppock*, 6 Wall. 94, 99 (1967).

In order to make Whatley whole he must be awarded pre-judgment interest on his back pay award. The award of back pay compensated Whately for wages he would have received, but for discrimination, from September 17, 1971, when he was fired, through December 4, 1980.

By retaining possession of money rightfully due Whatley from 1971 through 1980, Skaggs, and not What-

ley, had the benefit of either spending the money or earning interest on it. I find no inequity in now requiring Skaggs to turn that benefit over to Whatley in the form of prejudgment interest.

The Second Circuit, in the *International Association of Machinists and Aerospace Workers* case cited above, expressed concern that prejudgment interest may not be appropriate if the plaintiff inordinately delayed prosecution of the suit or engaged in other wrongdoing. *See also Goodwin v. City of Pittsburgh, supra* (prejudgment interest not awarded because of the plaintiff's dilatory prosecution of the case). Although judgment was not entered in this case until nine yeare after the discriminatoring firing,[1] I find that this delay was not primarily attributable to the plaintiff or his counsel. Indeed Skaggs does not assert otherwise, and therefore no hearing is required on this issue. Skaggs has stated with admirable candor that it attributes the delay to the multiple proceedings of the Colorado Civil Rights Commission and the Equal Employment Opportunity Commission, as well as to the Court's calendar, rather than to the plaintiff. Defendant's Response to Plaintiff's motion for Prejudgment Interest, p. 2 n. 1.

Courts have evaluated numerous other factors in determining whether to award prejudgment interest. One

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[1] Final judgment should have been entered as ordered on February 23, 1981. The Clerk of this Court, however, failed to enter judgment in this case. The failure to enter judgment was a clerical error. All persons involved in this case have proceeded as if judgment had entered. The Court of Appeals exercised jurisdiction and the defendant has paid the amount specified in the opinion and order for judgment of February 23, 1981. The Clerk shall enter judgment as ordered *nunc pro tunc* February 23, 1981.

such factor, failure of the plaintiff reasonably to mitigate damages,[2] is relevant to the issues whether back pay should be awarded and, if so, how much,[3] but is irrelevant, in my view, to the separate prejudgment interest issue.

Other courts award prejudgment interest only if the defendant acted in bad faith, either in the conduct giving rise to liability,[4] or by causing delay in the case.[5] This approach treats prejudgment interest as punitive in nature. The better approach for back pay awards in Title VII cases is that followed by the court in the *International Association of Machinists* case:

> "The district court seems also to have based its decision not to grant prejudgment interest from the dates of breach on the Company's good faith and innocence from 'unlawful, wrongful, and vexatious conduct.' 336 F. Supp. at 813-14, *citing United Protective Workers v. Ford Motor Co.*, 223 F.2d 49, 53, 54 (7th Cir. 1955). However, awards of prejudgment interest are essentially compensatory, *Norte & Co. v.*

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[2] *Syvock v. Milwaukee Boiler Mfg. Co., Inc.*, 665 F.2d 149, 162 (7th Cir. 1981) (no prejudgment interest in ADEA case where the plaintiff has not attempted to mitigate damages in a reasonable manner); *EEOC v. Trailways, Inc.*, 530 F. Supp. 54 (D. Colo. 1981) (prejudgment interest not awarded until evidence of the plaintiff's efforts to mitigate damages presented).

[3] *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 938 (10th Cir. 1979) (a Title VII claimant must make a good faith effort to mitigate damages).

[4] *Syvock, supra*, 665 F.2d at 162 (no prejudgment interest awarded where employer's conduct not willful); *EEOC v. Trailways, Inc.*, 28 FEP Cases 553 (D. Colo. 1981).

[5] *Glus v. G.C. Murphy Co.*, 629 F.2d 248, 258 (3d Cir. 1980), *vacated on other grounds*, 451 U.S. 935 (1981) (prejudgment interest not awarded in Title VII action where defendant did not unduly delay the litigation).

> *Huffines, supra,* 416 F.2d at 1189-91, and wrongdoing by a defendant is not a prerequisite to an award."

534 F.2d at 447.

The Supreme Court held in *Albemarle Paper* that a mere showing that an employer did not act in bad faith does not, standing alone, justify denying back pay. 422 U.S. at 422. "If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries." *Id.* Similarly, the award of prejudgment interest on back pay should not turn on the question of the employer's good or bad faith. Awarding prejudgment interest effectuates Title VII's purpose to "make whole" victims of discrimination. *Albemarle Paper, supra,* 422 U.S. at 419.[6] Accordingly, courts usually have included prejudgment interest in back pay awards. *See* 2 Larson, *Employment Discrimination* § 55.37(b)(iii), at p. 11-80.26 (1984).

Defendant urges this court to follow *Blim v. Western Electric Co.,* 731 F.2d 1473 (10th Cir. 1984), where the court held that, to avoid double recovery, prejudgment interest will not be granted in an ADEA case when liquidated damages have been granted in addition to back pay. I do not find the reasoning and holding in Blim applicable to the issue of prejudgment interest on a back pay award

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[6] See my recent opinion in *Garcia v. Burlington Northern Railroad Co.,* No. 82-C-1260 (Nov. 29, 1984), granting prejudgment interest on damages awarded under the Federal Employer's Liability Act (FELA), 45 U.S.C. §§ 51 *et seq.* (1982). The discussion of fairness and judicial efficiency considerations found there is equally applicable in a Title VII context.

under Title VII. Although Title VII and the ADEA have similar remedial purposes, Title VII does not have a liquidated damages provision. Liquidated damages are intended to provide compensation, without the need for proof and calculation, to an ADEA claimant for those losses suffered over and above lost wages, including the loss of use of unpaid wages for which prejudgment interest also compensates. *Gibson v. Mohawk Rubber Co.* 695 F.2d 1093, 1102 (8th Cir. 1982). While an award of prejudgment interest may result in double recovery when liquidated damages are awarded under the ADEA, prejudgment interest on a back pay award under Title VII creates no "double recovery" as the defendant asserts.

I conclude, therefore, that Whatley should be awarded prejudgment interest on the back pay award. The next step is to determine the proper rate of interest.

The plaintiff requests that the rate defined in *Richardson v. Restaurant Marketing Associates, Inc.*, 527 F. Supp. 690 (N.D. Cal. 1981) (90% of the average prime rate as determined by the Federal Reserve Bank for the year in which the calendar quarter occurs) be used and that the interest be compounded quarterly. Defendant, on the other hand, asserts that the appropriate rate of interest is that set by Colo. Rev. Stat. § 5-12-101 (1984 Cum. Supp.).

In *International Association of Machinists, supra*, 534 F.2d at 446, the court noted that "the decision whether to award prejudgment interest is governed by federal law, although it may be proper, as a matter of convenience, to look to state law in order to determine the appropriate rate." If I choose to adopt a state law rate as a matter of convenience, an appropriate Colorado statutory rate

appears to be, as Skaggs suggests, Colo. Rev. Stat. § 5-12-101 (1984 Cum. Supp.) which provides:

> "Legal rate of interest. If there is no agreement or provision of law for a different rate, the interest on money shall be at the rate of eight percent per annum, compounded annually."

I find that this rate, under the circumstances in this case, equitably compensates the plaintiff for loss of the benefit of his wages pending judgment. This rate shall be applied.

II. *Postjudgment Interest.*

Plaintiff Whatley moved the following appeal and remand for the award of postjudgment interest at the rate used in *Richardson v. Restaurant Marketing Associates, supra.* Counsel provided no authority for this request other than the "make whole" policy of Title VII. While this policy is relevant to a determination of the propriety of prejudgment interest, an issue on which Congress was silent, it does not trump 28 U.S.C. § 1961 which, in 1981 when the judgment was entered, explicitly provided:

> "Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law."[7]

The motion, therefore, is denied.

III. *Determination of Legitimacy of Reinstatement Offer.*

Plaintiff also moved after appeal for a determination that the offer of reinstatement made to Whatley in 1981

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[7] 28 U.S.C. § 1961 was amended in 1982 to provide a different formula for calculation of interest. *See* 28 U.S.C.S. § 1961 (1984 Cum. Supp.)

was not legitimate, and therefore he is entitled to continued back pay from February 1981 to the present date. After my order for reinstatement on November 25, 1980, Skaggs offered Whatley a position as lobby manager in Memphis, Tennessee or St. Louis, Missouri. Whatley declined. His reason for doing so is in dispute. He claims that the offers were not legitimate because his health prevented him from moving to those humid climates. It is undisputed, however, that neither Whatley nor his counsel discussed reinstatement with Skaggs after February 1981, and that they did not petition this court for relief until May 31, 1984. Whatley sat on his rights for three years. I conclude that he is now barred by laches from raising this issue.

IV. *Relief for Adverse Tax Consequences.*

Whatley moved following appeal, under Rule 54(c), for further relief to compensate him for the adverse tax consequences suffered from receiving his back pay award in a lump sum, rather than receiving his pay at regular intervals. Rule 54(c) is not a proper basis for this motion. Rule 54(c) provides that relief may be granted in a final judgment even if the party has not demanded such relief in his pleadings. Final judgment was ordered in this case on February 23, 1981.[8] Under Rule 54(c) the plaintiff at that time could have requested relief regarding adverse tax consequences. He did not. Under Rule 59(e), a motion to amend a judgment must be served within ten days

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[8] See footnote 1.

after entry of the judgment. This motion, filed May 24, 1984, is untimely.[9] The motion, therefore, is denied.

Accordingly,

IT IS ORDERED that the defendant pay the plaintiff prejudgment interest on the back pay award at a rate of eight percent compounded annually.

Dated at Denver, Colorado, March 20, 1985.

BY THE COURT:

/s/ Jim R. Carrigan
Jim R. Carrigan
UNITED STATES DISTRICT COURT

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[9] If the Clerk's failure to enter judgment when ordered on February 23, 1981 makes this motion technically timely, I refuse to exercise my equitable powers to grant the requested relief because for reasons of fairness to the defendant and judicial efficiency, this matter should have been raised in 1981.

APPENDIX C

42 U.S.C. § 2000e-2(e). Discrimination because of race, color, religion, sex, or national origin

(a) Employers. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-5. Enforcement provisions

(g) Injunctions; affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders. If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years

prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [42 USCS § 2000e-3(a)].

42 USCS § 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.